

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
APPENDIX**

77-7086

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHESA INTERNATIONAL, LTD.,

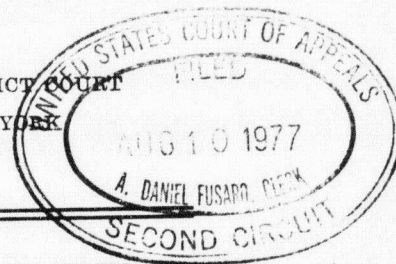
Plaintiff-Appellee,

v.

FASHION ASSOCIATES, INC., HONG KONG QUALITY
KNITTERS, LTD., and JEROME FINKELSTEIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLEE'S SUPPLEMENTARY APPENDIX

LADAS, PARRY, VON GEHR,
GOLDSMITH & DESCHAMPS
Attorneys for Plaintiff-Appellee
10 Columbus Circle
New York, New York 10019
(212) 245-2600

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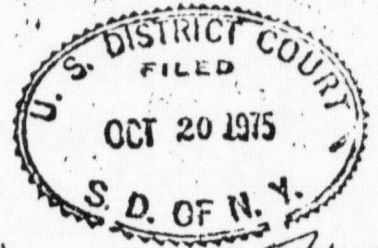
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FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHESA INTERNATIONAL, LTD.,
Plaintiff,
vs.
FASHION ASSOCIATES, INC.,
Defendant.



75 Civ. 3522 LFM

FINAL
CONSENT DECREE ENTERED UPON *ATTACHED*
STIPULATION

The plaintiff having filed its complaint demanding a permanent injunction as appears more fully in the complaint and prayer for relief therein, and this case having been heard on an Order to Show Cause on Plaintiff's Motion for a Preliminary Injunction, and the Preliminary Injunction having been granted, and the plaintiff and defendant having agreed upon a basis for the adjudgment of the matters alleged in the Complaint and the entry of a judgment in this action, and having entered into a Stipulation, original of which is being filed with the Court, and due deliberation being had thereon, now, on Motion of Counsel for plaintiff, it is

ORDERED, that final judgment in favor of the plaintiff and against the defendant is hereby granted and ordered entered as the judgment in this action as follows:

Defendant, FASHION ASSOCIATES, INC., its officers, directors, agents, servants, employees, attorneys and persons in active concert and/or participation with it be and hereby are enjoined from

FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

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- a) Using on or in connection with clothing or the clothing business, or goods of services or related thereto the GG Design trademark annexed hereto identified as Exhibit A, or colorable imitation thereof,

- b) Manufacturing, copying, using, selling, disposing of and/or in any other way disseminating any merchandise bearing said trademark which does not emanate from plaintiff.

~~And it is further~~

ORDERED, that defendant deliver up to plaintiff all infringing labels, signs, prints, packages, wrappers, receptacles, advertisements and goods in possession of control of defendant bearing the said GG Design trademark or colorable limitation thereof, whether or not affixed to any goods, and all plates, molds, matrices and other means for making same.

Dated: New York, N.Y. this

15th day of October, 1975.

Stanley M. Melick
United States District Judge
for the Southern District of
New York

in A.

[Handwritten signature]

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FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

JUDGMENT ENTERED - 10/21/95

Raymond F. Birghardt
CLERK

75 Civ. 3522 LFM

WHEREAS, the parties wish to settle this action

FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

without further Court proceedings;

NOW, therefore, without further trial or adjudication of any issue of fact or law raised by the complaint herein, the parties hereby agree as follows:

1. Plaintiff and defendant hereby waive any further entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure and Consent to the entry

by the Court of a final judgment in the form annexed hereto, ~~as~~ ~~herein~~ at any time after the date hereof upon motion of either party without notice or any further proceedings;

2. ~~Defendant agrees to deliver up to plaintiff within 30 days hereof all infringing labels, signs, prints, packages, wrappers, receptacles, advertisements and goods in possession or control of defendant's bearing the said GG Design trademark or colorable limitation thereof, whether or not affixed to any goods, and all plates, molds, matrices and other means for making same; Defendant states that it has no garments or effects with the mark of the Plaintiff.~~

3. On faithful execution hereby by defendant and adherence to the terms of the attached final judgment by defendant, plaintiff waives all claims to monetary damages, whether actual or punitive, arising out of the acts herein complained of;

4. Plaintiff and defendant hereby consider all pleadings amended in accordance herewith.

5. No representations or promises of any kind, other than as contained in this Stipulation have been made by the plaintiff or its attorneys or agents to induce defendant to enter into this Stipulation or to Consent to the entry of the judgment;

FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

IN WITNESS WHEREOF, the parties hereto, by their officers acting with full authority, hereby set their hands and seals as of the 25th day of September, 1975.

CHESA INTERNATIONAL, LTD.

By David Zimber
Title Treasurer

(Seal)

Attest: [Signature]
Title Secretary

FASHION ASSOCIATES, INC.

By [Signature]
Title [Signature]

(Seal)

Attest: [Signature]
Title [Signature]

Treasurer of CHESA INTERNATIONAL, LTD., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation, that the said seal affixed to said instrument is such corporate seal; that it was so affixed by authorization of the Board of Directors of said corporation and that ~~she~~ signed his name thereto by like authorization.

James G. Repke
Notary Public

ANNE B. RIFKIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-328905
Qualified in New York County
Term Expires March 30, 1977

On this 6th day of ~~September~~, 1975, before me personally appeared JEROME FINKELSTEIN to me known, who, being by me duly sworn, did depose and say that he is the President of FASHION ASSOCIATES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation, that the said seal affixed to said instrument is such corporate seal; that it was so affixed by authorization of the Board of Directors of said corporation and that he signed his name thereto by like authorization.

FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

LADAS, PARRY, VON GEHR, GOLDSMITH
& DESCHAMPS
Attorneys for Plaintiff

By

Lawrence E. Abelman
Lawrence E. Abelman

Norma G. Weinberger
Notary Public
NORMA G. WEINBERGER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 14, 1974
MESSRS. GEIGER & GEIGER
Attorneys for Defendant

By

Mary K. Geiger

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FINAL CONSENT DECREE ENTERED UPON ATTACHED STIPULATION

[Handwritten signature]

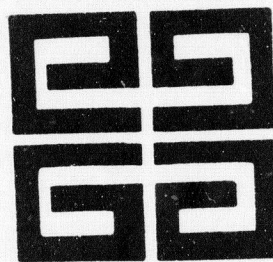


EXHIBIT A

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHESA INTERNATIONAL, LTD.,

Plaintiff,

vs.

FASHION ASSOCIATES, INC.,
HONG KONG QUALITY KNITTERS LTD.,
JEROME FINKELSTEIN and
ETHEL FINKELSTEIN,

Defendants.



75 CIV 3522 LFM

ORDER ADJUDGING IN CONTEMPT
AMENDING FINAL CONSENT DECREE
AND FOR PRELIMINARY INJUNCTION

These matters came on by Order to Show Cause to
Adjudge Defendants in Contempt and for Other Relief (75 CIV
3522 LFM) and by Order to Show Cause with Temporary Restraining
Order for Preliminary Injunction (76 CIV 1262 CHT). By
Order to Show Cause to Consolidate (76 CIV 1262 CHT) and
upon a showing by plaintiff of common issues of law and fact
and so as to avoid unnecessary costs and delay, these actions
were ordered consolidated, for all purposes pursuant to Rule
42(a), Federal Rules of Civil Procedure.

Now having considered the affidavits submitted by
the parties and having considered that certain allegations
set forth in plaintiff's affidavits were not controverted
by defendants, hence may be deemed admitted, and having heard
testimony and arguments presented at a Hearing on April 30,
1976, the Court makes the following:

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

FINDINGS OF FACT

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1. Plaintiff, CHESA INTERNATIONAL, LTD., has manufactured and sold tee shirts bearing the embroidered and silk-screened trademarks shown in Exhibits A, B and C hereto for approximately three years. Over one million tee shirts bearing these trademarks have been sold by the plaintiff.

~~and approximately \$300,000.00 has been spent advertising these
tee shirts annually.~~

2. The plaintiff's use of these trademarks on tee shirts is done under license from Givenchy S.A., and the quality of these tee shirts as to style and workmanship is specified and approved by Givenchy S.A. or by an authorized agent of Givenchy S.A. in the United States. The clothing trade - buyers and store owners - as well as the purchasing public recognize these trademarks as indicating origin of these shirts with Givenchy through the plaintiff, and associate such goods with high standards of fashion and quality.

3. Only defendant FASHION ASSOCIATES, INC., was named as a defendant in the previous proceedings in which that defendant was found to have infringed deliberately the mark shown in Exhibit A hereto by using an identical embroidered mark on tee shirts.

4. Subsequent to the issuance of a preliminary injunction in these previous proceedings, a Stipulation for Consent Decree, dated September 25, 1975, was entered into

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

between plaintiff and defendant FASHION ASSOCIATES, INC.,
which does provide, in relevant part, as follows:

1. Plaintiff and defendant hereby
waive any further entry of findings
of fact and conclusions of law under
Rule 52 of the Federal Rules of
Civil Procedure and Consent to the
entry by the Court of a final judg-

ment in the form annexed hereto, at
any time after the date hereof upon
motion of either party without notice
or any further proceedings;

.

2. On faithful execution hereby by
defendant and adherence to the terms
of the attached final judgment by
defendant, plaintiff waives all claims
to monetary damages, whether actual
or punitive, arising out of the acts
herein complained of.

5. Pursuant to the Stipulation and on Motion
by counsel for the plaintiff, a Final Consent Decree was
filed in this Court on October 20, 1975. Judgment was en-
tered on October 21, 1975, which does provide, in relevant
part, as follows:

"Defendant, FASHION ASSOCIATES, INC.,
its officers, directors, agents, ser-
vants, employees, attorneys and per-
sons in active concert and/or partici-
pation with it be and hereby are
enjoined from

a) using on or in connection with
clothing or the clothing business, or
goods or services related thereto the
GG Design trademark annexed hereto
identified as Exhibit A, or colorable
imitation thereof,

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

b) manufacturing, copying, using,
selling, disposing of and/or in any
other way disseminating any merchan-
dise-bearing said trademark which
does not emanate from plaintiff.

6. Such judgment does not award to plaintiff
monetary damages, whether actual or punitive, arising out of
the acts complained of therein by plaintiff.

7. On November 10, 1975, twenty days after
judgment was entered in this Court, defendant HONG KONG
QUALITY KNITTERS LTD., was incorporated under the laws of
the State of New Jersey.

8. Defendant JEROME FINKELSTEIN is a principal
of both FASHION ASSOCIATES, INC., and HONG KONG QUALITY
KNITTERS LTD.

9. ETHEL FINKELSTEIN is Vice-President of
FASHION ASSOCIATES, INC., and the sole first director of
the First Board of Directors of HONG KONG QUALITY KNITTERS
LTD.

10. FASHION ASSOCIATES, INC. and HONG KONG
QUALITY KNITTERS LTD. share common business facilities.

11. The designated location of the principal
office of the HONG KONG QUALITY KNITTERS LTD. is the resi-
dence of JEROME FINKELSTEIN and ETHEL FINKELSTEIN.

12. ~~Telephone calls to the New York City~~
~~Telephone listing for HONG KONG QUALITY KNITTERS LTD. are~~
~~answered by employees on behalf of FASHION ASSOCIATES, INC.~~

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

12. Sometime after entry of this Court's judgment on October 21, 1975, ~~on instructions from defendant~~
~~JEROME FINKELSTEIN to purchase some item bearing a mark as close~~
~~as possible to that of plaintiff's mark shown in Exhibit A,~~ defendant JEROME FINKELSTEIN's daughter did purchase
a metallic bracelet bearing a trademark similar to that
shown in Exhibit D.

13. Shortly thereafter, defendant HONG KONG QUALITY KNITTERS LTD. began using the trademarks shown in Exhibits C and D, by selling tee shirts bearing these marks to various retail stores within this district.

14. The trademark shown in Exhibit D is a colorable imitation of the trademarks shown in Exhibits A and B.

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

CONCLUSIONS OF LAW

1. Plaintiff has valid common law rights in the trademarks shown in Exhibits A, B and C which plaintiff licenses from Givenchy S.A.

2. Defendants are found to be in contempt of this Court, having willfully violated the Order of this Court, which was entered on October 21, 1975. "A party under injunction must do more than see how close it can come with safety to that which it was enjoined". AMF Incorporated vs. International Fiberglass Company, Inc., 469 F.2d 1063 (1st Cir. 1972). Defendants may not evade responsibility for violating an injunction by accomplishing that which they were enjoined from doing through a corporation which they themselves subsequently form and control. Babee-Tender Corporation vs. Scharco Manufacturing Co. Inc., 156 F. Supp. 582 (S.D.N.Y. 1957). In determining the amount of fines to be assessed against defendants, we consider "the need to deter deliberate infringers", W.E. Bassett vs. Revlon, Inc., 435 F.2d 656, 664 (2d Cir. 1970); see Big O Tire Dealers, Inc., vs. The Goodyear Tire and Rubber Company 189 USPQ 17 (D. Col. 1976) (\$16,800,000.00 punitive damages award).

3. Defendants have willfully failed to adhere faithfully to the terms of the Final Consent Decree entered on October 21, 1975, and accordingly, pursuant to Rule 60(b) Federal Rules of Civil Procedure, this Court finds it equitable to relieve plaintiff from such Decree by amending same so as to award to plaintiff damages. ~~plaintiff's damages~~

~~See~~ See, Martina Theatre Corporation vs. Schine Chain Theatres, Inc., 278 F.2d 798 (2d Cir. 1960).

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

4. Defendant's use of the trademark shown in Exhibits C and D on tee shirts constitutes a willful infringement of plaintiff's common law rights in those trademarks shown in Exhibit B and C. There is an overwhelming probability that plaintiff will prevail on the merits at trial. Since in a trademark infringement action a party faces the probability of loss of trade and damage to its goodwill, the damages which may be suffered by plaintiff, unless defendants are enjoined, are "by their very nature irreparable and not susceptible of adequate measurement". Tefal, S.A. vs. Products International Co. 186 U.S.P.Q. 545, 548 (D.N.J. 1975), affd. 529 F2d 495 (3d Cir. 1976).

WHEREFORE, it is Ordered, Adjudged and Decreed:

AS TO THE CONTEMPT

1. That FASHION ASSOCIATES, INC., HONG KONG QUALITY KNITTERS LTD. ^{AND} JEROME FINKELSTEIN ~~and EDWARD FINKELSTEIN~~ purge themselves of their contempt of the Court by taking the following action:

- a) Fully comply with all the provisions of the Court's Judgment entered on October 21, 1975;
- b) Cease desist using on or in connection with clothing or the clothing business, or goods or services related thereto the trademark annexed hereto identified as Exhibit D or any colorable imitation thereof;
- c) Cease and desist manufacturing, copying, using, selling, disposing of and/or in any other way disseminating any merchandise bearing said trademark or any colorable imitation thereof which does not emanate from plaintiff;

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

d) Deliver up to plaintiff within thirty days hereof all contemptuous tee shirts, other articles of clothing, labels, signs, prints, packages, wrappers, receptacles, advertisements and goods in possession or control of defendant bearing the said trademark or any colorable imitation

thereof whether or not affixed to any goods, and all plates, molds, matrices and other means for making same;

e) Pay to plaintiff all profits made by virtue of their contemptuous acts or an amount equal to plaintiff's loss of anticipated profits, whichever is greater, from such sales illegally made from October 21, 1975, through the date of this Court's order herein;

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mrd

~~f) Pay to plaintiff fines in the amount of \$100,000.00, jointly and severally.~~

g) File with this Court and the plaintiff, within thirty days after the entry of this decree, a sworn statement setting forth in detail the steps taken to comply therewith; and

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~~h) Reimburse plaintiff for all costs of this litigation, including costs of investigation, preparation for and conduct of this proceeding, reporting fees and reasonable attorney's fees within five days after service of a copy upon defendant's counsel of such costs as taxed and the computation of his expense and counsel fees in connection with this proceeding, as approved by the Court.~~

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

AS TO THE AMENDMENT OF THE
FINAL CONSENT DECREE

2. That the judgment entered on October 21, 1975 be hereby amended such that FASHION ASSOCIATES, INC., with respect to its infringing use of the trademark shown in Exhibit A prior to the entry of such judgment, be required:

a) To pay to plaintiff all profits made by virtue of such infringing acts or an amount equal to plaintiff's loss of anticipated profits whichever is greater, from such prior sales illegally made by defendant, ~~added~~

~~on account of the willfulness of such conduct, and~~

b) ~~To pay to plaintiff the costs and~~

~~able attorney's fees incurred in these previous proceedings~~

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

SPECIAL MASTER

DOUGLAS F. EATON Esq. 745 FIFTH AVE

NEW YORK, N.Y. 10022 (759-1919), IS APPOINTED SPECIAL MASTER

PURSUANT ~~to Rule 53, Federal Rules of Civil Procedure, to take~~

an accounting and determine the amount of monetary damages
and profit as referred to above in paragraph 1 and 2, &

defendants to pay any and all fees due such Special Master.

**THE SPECIAL MASTER SHALL HEAR AND DETERMINE THE MATTER
AND FILE HIS REPORT WITH THE COURT WITH ALL CONVENIENT SPEED
AND IN NO EVENT**

**LATER THAN
AUGUST 16, 1976.**

**AS TO THE
PRELIMINARY INJUNCTION**

4.

The plaintiff having given security which
has been approved by the Clerk of this Court, in the amount
of \$5,000.00, that pending the determination of this action,
defendants FASHION ASSOCIATES, INC., HONG KONG QUALITY KNIT-
TERS LTD., JEROME FINKELSTEIN and ETHEL FINKELSTEIN and
their respective officers, directors, agents, servants, em-
ployees, attorneys and all persons in active concert and/or
participation with them be and hereby are enjoined during
the pendency of this action from:

a) Using on or in connection with clothing
or the clothing business, or goods or services related there-
to the trademarks set forth in the attached Exhibits B and
C, colorable imitations thereof, or any other trademark tend-
ing to dilute or diminish their value, including, but not
limited to, that trademark set forth in Exhibit D.

b) Manufacturing, copying, using, selling,
disposing of and/or in any other way disseminating any mer-
chandise bearing the above trademarks which do not emanate
from plaintiff.

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

June 8,

DATED: New York, New York, ~~May 18~~, 1976

- 6/9/76

Raymond F. Burglar
CLERK

Sam F. MacNeil

United States District Judge
for the Southern District of
New York

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

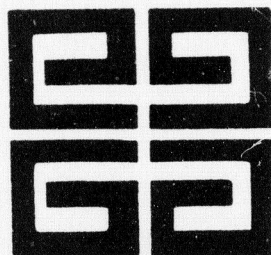


EXHIBIT A

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

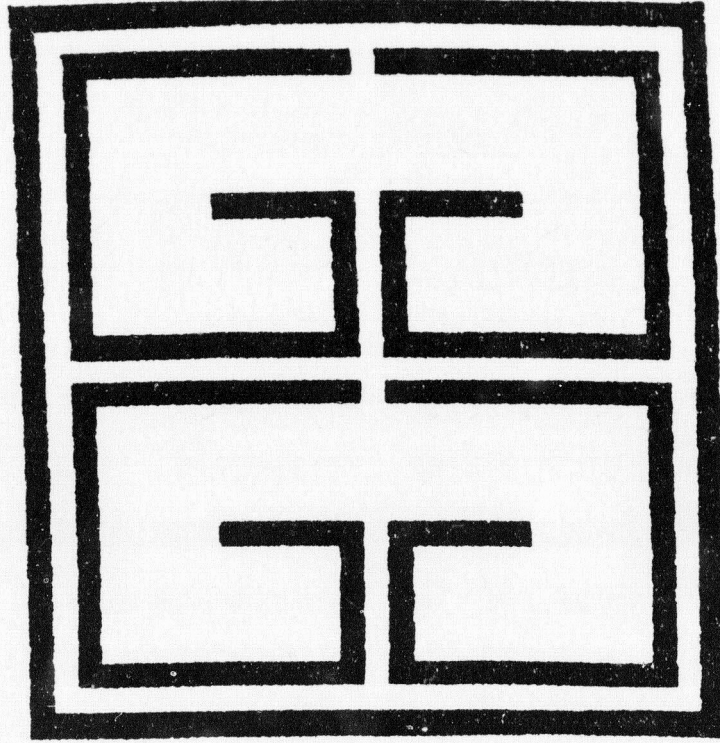


EXHIBIT B

SA - 23

ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

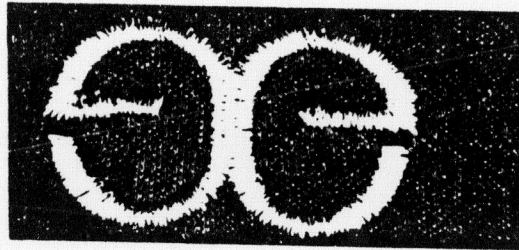


EXHIBIT C

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ORDER ADJUDGING IN CONTEMPT, AMENDING FINAL CONSENT
DECREE AND FOR PRELIMINARY INJUNCTION

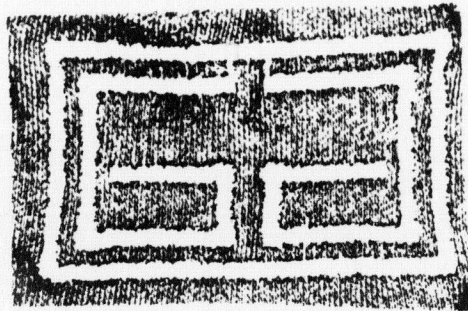


EXHIBIT D

SPECIAL MASTER'S REPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CHESA INTERNATIONAL, LTD.,

Plaintiff,

75 Civ. 3522 (LFM)

-against-

SPECIAL MASTER'S
REPORT

FASHION ASSOCIATES, INC., et al.,

Defendants.
-----X

APPEARANCES:

Paul B. Morofsky, Esq.,
James N. Palik, Esq., and
Robert Alpert, Esq., of
Ladas, Parry, Von Gehr, Goldsmith
& Deschamps
New York, New York for Plaintiff

Matthew M. Keshishian, Esq.,
Paterson, New Jersey, pro hac vice

and

Robert Rattet, Esq.,
New York, New York for Defendants

I. Preliminary Statement

This case involves women's T-shirts. On July 28, 1975, this Court found that Givenchy, S.A. had a common law trademark in an emblem consisting of four G's. The trademark was licensed to plaintiff and infringed by defendant Fashion Associates, Inc. A preliminary injunction against that defendant was issued on the same day.

1. _____

The emblem is reproduced in Exhibit "A" annexed to this Court's order of June 9, 1976.

SPECIAL MASTER'S REPORT

A permanent injunction was entered on October 21, 1975 on consent. It enjoined Fashion Associates and persons in active concert with it from using the four-G emblem "or colorable imitation thereof".

That order was wilfully violated by Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., and Jerome Finkelstein, 2. who started selling T-shirts with a two-G emblem, basically the lower half of the Givenchy trademark.

On June 9, 1976, this Court:

(a) held those three defendants to be in contempt of this Court;

(b) amended the judgment of October 21, 1975 so as to provide damages that plaintiff had conditionally waived; and

(c) appointed me as a Special Master.

I was directed to determine the amount of:

(1) the profits made by the three defendants from the contemptuous sales from October 21, 1975 through June 9, 1976 (or plaintiff's loss of anticipated profits, if greater); and

2. This emblem is reproduced in Exhibit "D" annexed to this Court's order of June 9, 1976. It should not be confused with a different, "back-to-back" 2-G emblem (reproduced in Exhibit "C"), which was the subject of a preliminary injunction and is not before me.

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SPECIAL MASTER'S REPORT

(2) the profits made by Fashion Associates, Inc. from the infringing sales prior to October 21, 1975 (or plaintiff's loss of anticipated profits, if greater).

In the proceedings before me, the plaintiff has elected to prove the defendants' profits, rather than its own loss of profits. The plaintiff's task has been made difficult by defendants' misconduct before me. This included repeated delays in providing discovery, outright refusal to provide some of the discovery which I directed, and the submission of one piece of fabricated evidence.

Since a Special Master does not wield the coercive power to punish for contempt, relatively little evidence has been added to the record which was before the Court. In a sense, the intrinsic value of this evidence has been overshadowed by the misconduct. Accordingly, a large part of this Report will be a description of this misconduct, so that the Court may decide whether to impose the sanctions provided by Rule 53(d)(2) of the Federal Rules of Civil Procedure.

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SPECIAL MASTER'S REPORT

II. An Outline of Defendants' Misconduct
Before Me

On June 24, 1976, I met with all five attorneys. At the end of the meeting, I orally directed the defendants to answer 13 questions by affidavit and produce certain documents by July 6th. I said I would also put this directive in written form, which I did on the following day in a letter (Exhibit 1).^{3.}

At the meeting, Mr. Keshishian stated that the defendants would supply all the information except the answer to Question 13.

On July 6th, the defendants supplied nothing. On July 7th and 8th I talked with Mr. Keshishian by telephone. He repeated his objection to Question 13. He also claimed that he never agreed to answer Questions 1 and 4. I warned him of the sanctions provided by Rules 37 and 53 of the Federal Rules of Civil Procedure. He said the defendants would not answer these three questions unless the order came from a judge. As to all the other items, he conceded that the defendants had no objection to them, but refused to produce any of them unless plaintiff agreed not to apply for sanctions.

3.
References to "Exhibits" are to the Special Master's Exhibits submitted with this Report, unless otherwise noted.

SPECIAL MASTER'S REPORT

On July 21st, plaintiff, after some fruitless discussions with Mr. Keshishian, served a motion for sanctions, returnable before me on August 2, 1976 (Exhibit 2).

At the August 2nd hearing, Mr. Keshishian appeared in my office with his client, Mr. Finkelstein. They did not bring the affidavit or documents which were four weeks overdue. Mr. Finkelstein answered the questions which I had posed for his affidavit, except that he refused to answer Questions 1, 4 and 13. He also answered some other questions asked by plaintiff's attorneys and me. His answers were not under oath and were not recorded. His attorneys had not told anyone in advance that he would appear at the hearing.

I orally directed Mr. Finkelstein to produce the affidavit and other documents by August 6th. Mr. Finkelstein said that none of his records ever showed how many T-shirts bore a particular emblem. In view of that, I directed him to supply the invoices for every sale that possibly included one of the two Givenchy emblems. I reserved decision on the motion for sanctions

On August 5th, Mr. Finkelstein submitted an affidavit (Exhibit 3). It supplied the same information he had given at the meeting, and repeated his refusal to answer Questions 1, 4 and 13.

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SPECIAL MASTER'S REPORT

Mr. Keshishian says that he mailed copies of defendants' invoices to plaintiff's attorneys on August 6th. They never arrived. On August 12th he was told to send another set of copies. These arrived on August 16th. There were only ten invoices (Exhibits 4-13). None of them was to Bolton's, a conceded customer.

On August 23rd, Mr. Keshishian forwarded what he said was "the one missing Bolton's invoice" (Exhibit 14). Mr. Finkelstein later admitted that this was not a genuine invoice, and that he had freshly "reconstructed" it "from memory".

On September 3rd, Mr. Finkelstein submitted an affidavit (Exhibit 16) which claimed certain amounts for cost and deduction. This information was two months late. Moreover, it was not supported by any documents, which the defendants had been ordered to supply by July 6th.

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SPECIAL MASTER'S REPORT

III. Plaintiff's Motion for Sanctions

I turn now to plaintiff's motion for sanctions. It should be noted that the defendants did not submit any timely papers in opposition, and the motion could be granted on that ground alone. On July 28th, Mr. Keshishian did send a letter (Exhibit 17) which asserted that the motion contained "false statements", but he did not specify any. On August 6th, nine days late, the defendants submitted an opposing affidavit by Mr. Finkelstein (Exhibit 18). This affidavit was patently frivolous, as will be shown below.

Rule 53(d)(2) provides in part:

"If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45."

There is no dispute that the defendants failed to give any evidence at all until four weeks after it was due. There is no dispute that the defendants had possession of all the evidence that I ordered them to produce. The only issue is whether there was any adequate excuse. I find there was none. As I see it, this issue has two aspects: (1) Was compliance with my order unduly burdensome? (2) Was any of the evidence immune from discovery?

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The first aspect can be disposed of quickly. The defendants have not really said that compliance was burdensome. Mr. Finkelstein did make the following statement (Exhibit 18, ¶4):

"The short delay was not intentional, and was caused solely due to economic problems."

This statement is patently frivolous. We are talking about a one-month delay in supplying ten invoices and a two-page affidavit.

As to the evidence which defendant has never supplied, the defendants have never claimed that it is voluminous or difficult to gather.

I now turn to the question of whether any of this evidence was immune from discovery. The defendants have objected to only three of the questions in my order: 1, 4 and 13. There is no claim that any of the other evidence was immune from discovery. In my opinion, the defendants waived their objections to Questions 1 and 4 because they did not object until after the due date. Nevertheless, I shall set forth the reasons why I think these questions are proper.

Questions 1 and 4 asked for the names and addresses of all of the defendants' embroiderers, and all of the defendants' customers, for a period of two and one-half years.

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The purpose of Questions 1 and 4 was to give the plaintiff an opportunity to verify the defendants' answers to Questions 2 and 5. They asked for the same information, except Questions 2 and 5 were limited to embroiderers who embroidered the two Givenchy marks, and customers who received merchandise with the two Givenchy marks. Eventually, when Mr. Finkelstein answered Questions 2 and 5, he relied basically on his memory, since his records never made any notation about any particular mark.

Plaintiff's attorneys had anticipated this result back at the initial meeting. It was obvious that the defendants never had any incentive to keep accurate records about the Givenchy marks, or about the true amount of their sales, but that they did have incentives to keep accurate records of their embroiderers and customers. Plaintiff's attorneys stated that they wanted to write to the other embroiderers and customers, and ask them about the two Givenchy marks.

In order to secure this opportunity for verification, plaintiff's attorneys made significant concessions at the initial meeting. They agreed to withdraw their request for defendants' ledger books and bank records. They also agreed to honor my order that they not divulge, "to their client or to anyone not in the employ of their law firm, any of the names or addresses of embroiderers or customers."

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With such a protective order, the names of customers are a proper subject of discovery. La Chemise Lacoste v. General Mills, Inc., 53 F.R.D. 596, 605 (D.Del. 1971), aff'd. on other issues, 487 F.2d 312 (3 Cir. 1973); American Oil Co. v. Pennsylvania Petroleum Co., 23 F.R.D. 680, 683-85 (D.R.I. 1959) (dealing with Interrogatories 13 and 20); Louis Weinberg Associates v. Monte Christi Corp., 15 F.R.D. 493, 494-95 (S.D.N.Y. 1954).

The embroiderers are a type of supplier. I do not see why their names should be immune any more than the names of customers. Moreover, in this particular case, the embroiderers might well have better records or better memories of particular marks than the customers would have.

Question 13 was as follows:

"What are the names (including all trading names) of every company which was ever involved in the garment business between January 1, 1974 and June 8, 1976, and of which Jerome Finkelstein, during any part of that time, was an officer, partner, or the owner of more than 10% of the stock?"

The defendants' position is that "any other company involved with Mr. Finkelstein is not a party to this suit, and irrelevant." However, Mr. Finkelstein is a party, and he is liable for profits on sales made by him through his agents, including other companies.

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Question 13 is justified by the record which has already been made before this Court. Mr. Finkelstein signed a consent decree on behalf of one of his companies. Another company was soon formed, Hong Kong Quality Knitters, Ltd., which then sold T-shirts in violation of the decree. Mr. Finkelstein stated to me that he is the only employee of that company. His refusal to say whether there are other such companies is unjustified.

In summary, I find that there was no adequate excuse for the failure to answer Questions 1, 4 and 13, or for the failure to give any of the other required evidence until plaintiffs moved for sanctions. I find that the defendants wilfully disobeyed my order of June 25, 1976, and that they are liable to the sanctions provided in Rules 37 and 45.

Plaintiff's motion asked for the finding which I have just made, and also asked for certain specific sanctions. After the motion was made, the defendants finally supplied some discovery, which, in my opinion, makes some of the requested sanctions unnecessary. I have concluded that two sanctions should be imposed. First, pursuant to Rule 37(b)(2)(B), defendants should not be allowed to support any claim for cost or deduction in computing their profits. In addition, pursuant to the last sentence of Rule 37(b)(2), the defendants and Mr. Keshishian, jointly and severally, should be required to pay the reasonable

SPECIAL MASTER'S REPORT

expenses, including attorney's fees, caused by the failure to obey my discovery order. In all other respects, plaintiff's motion should be denied. However, as will be seen below, defendants' misconduct will continue to be a factor in deciding the amount of their sales.

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IV. Preclusion of Claims for Cost and Deduction

Title 28, United States Code, §1117 provides that "defendant must prove all elements of cost or deduction claimed." In my discovery order of June 25th (Exhibit 1, Item B-2), I directed the defendants to produce, by July 6th, copies of "all documents which support any element of cost or deduction claimed by defendants." The defendants soon adopted a stiff-necked attitude that they would produce them when they felt like it. On July 8th, and on other occasions, I warned Mr. Keshishian that the consequence would be preclusion of all claims for cost and deduction.

On September 3rd, two months late, and more than two weeks after the deadline originally set for the submission of this Report, Mr. Finkelstein submitted an affidavit claiming four items of average costs, totalling \$4.70 per T-shirt (Exhibit 16, ¶6). The plaintiff should not have to attempt to oppose these claims at this late date. Moreover, the defendants have still not complied with my order; aside from this conclusory affidavit, they have not produced a single document to support these claims, although they have never said there are no records of the amounts paid to suppliers, workers, shippers, etc. Accordingly, I find that the defendants have utterly failed to prove any element of cost or deduction. In addition, pursuant to Rule 37(b)(2)(B), I find that they should not be allowed to support any such claims.

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V. Award of Expenses

Plaintiff's attorneys have submitted an affidavit (Exhibit 19) stating that plaintiff has incurred \$4,662.50 in attorney's fees and \$66.86 in related expenses in connection with the proceedings before me. I find that the affidavit is detailed and accurate, except for an arithmetical error of 1/2 hour in paragraph 4. I also find that the hourly charges for the attorneys involved are reasonable.

However, I must determine to what extent these expenses were "caused" by the failure to obey my discovery order. Defendants' initial default occurred on July 6th. Therefore, I have excluded all expenses incurred before that date. A major source of the remaining expenses was the preparation of the motion for sanctions. Mr. Keshishian was warned well in advance that this motion would be prepared, and that plaintiff would seek attorney's fees pursuant to Rule 37. The defendants produced nothing until that motion was brought on for hearing. I find that plaintiff should be paid for these expenses. The plaintiff's lawyers spent additional time in telephone conversations with Mr. Keshishian and me. I can attest that these conversations were necessitated by the default. I have excluded the hour spent by Mr. Alpert on August 3rd, and the hour spent by Mr. Palik on August 19th, because it is not clear to me that that time was

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caused by the default. All three of plaintiff's lawyers attended the August 2nd hearing. Although this was not strictly necessary, I find that it was reasonable. All three had also attended the first meeting, prior to the default. The alternative would have been to spend time back at the office debriefing the colleague who attended. Moreover, all three attorneys participated helpfully in the questioning of Mr. Finkelstein. I have excluded all of the disbursements, which are mostly for photocopying, because it is not clear what part was devoted to the motion for sanctions.

In summary, I find that the default caused the following expenses to plaintiff:

\$885. for Mr. Alpert's time (14-3/4 hours at
\$60. per hour)

\$500. for Mr. Morofsky's time (4 hours at
\$125. per hour),

\$1,500. for Mr. Palik's time (15 hours at
\$100. per hour)

for a total of \$2,885.

I also find that Mr. Keshishian should be held jointly and severally liable for this amount, along with the three defendants. He was warned, two days after the default, that Rule 37(b) provides for expense awards against the attorney advising the defaulting party. It is undisputed that Mr. Keshishian was the attorney advising the defendants in this proceeding, preparing Mr. Finkelstein's affidavits, and forwarding

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such documents as were eventually provided. Mr. Rattet served only as local counsel.

I shall now set forth a series of events which have convinced me that Mr. Keshishian contributed significantly to the pattern of delay and defiance.

1. At the initial June 24th meeting, he agreed to supply the names of all the defendants' customers and embroiderers after plaintiff's attorneys agreed, and I directed, that they could not divulge any of this information to their client or to anyone not in the employ of their law firm. Subsequently, Mr. Keshishian apparently changed his mind, and decided that this protection was not enough. Yet he made no effort to apply to me or to the Court for a more stringent protective order. He simply let the due date come and go.

2. He did not advise me or plaintiff's attorneys that there would be no production. He simply waited until someone called him.

3. On July 7th, Mr. Keshishian prepared and sent to this Court an affidavit by Mr. Finkelstein which had been required by the Court's order of June 9th. This affidavit was misleading. It said:

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"...Defendants were required to turn over a list of every single customer we dealt with together with our embroiderers. I feel this information is improper and excessive and once in the hands of the Plaintiff could conceivably put us out of business."

In fact, plaintiff's attorneys and I had undertaken to ensure that this information did not get into the hands of the plaintiff.

4. On July 7th, Mr. Keshishian claimed that he never agreed to answer Questions 1 and 4. This is contrary to my clear recollection of the June 24th meeting.

5. On July 8th, Mr. Keshishian refused even to produce the items to which he had no objection, unless plaintiff waived all rights to sanctions.

6. On July 22nd, after the sanctions motion was served, I telephoned Mr. Keshishian's secretary. I told her that the defendants were to serve any papers opposing the motion by July 28th. I also told her that I wanted Mr. Keshishian to call me. I received no word from him until he appeared for the August 2nd hearing. He had put in no opposing papers, unless one is to consider an

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intemperate letter (Exhibit 17) which he sent on July 28th to plaintiff's attorneys, with a copy to me. His final sentence apparently sums up his attitude toward Rule 53 and Rule 37(b):

"I certainly do not feel that the Special Master in this particular case has any jurisdiction over my personal handling of this matter, and I consider your proposed sanctions against me to be insulting and in extremely poor taste."

7. On August 5th, Mr. Keshishian prepared an affidavit by Mr. Finkelstein (Exhibit 3). Paragraphs A 1 and A 4 falsely indicated that I had ordered the names of embroiderers and customers to be turned over to plaintiff. Paragraph B 2 defied the second due date which I had ordered, and announced that the documents about cost and deduction would be produced only "after review of all other information presented."

- 8. On August 6th, Mr. Keshishian prepared an affidavit by Mr. Finkelstein (Exhibit 18). As I have shown above, at pages 6-7, this affidavit was patently frivolous.

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In providing for expense awards, the last sentence of Rule 37(b) uses the mandatory word "shall", and allows for an exception only if "the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." On August 2nd, Mr. Keshishian advised me that his senior partner had suffered a heart attack in July, and that his own workload had increased as a result. I have given sympathetic consideration to this circumstance. Nevertheless, in my opinion, this case clearly falls outside the Rule's exception.

VI. Amount of Defendants' Sales

We come, at last, to the main purpose of these proceedings, the determination of the amount of defendants' profits. Since I have precluded defendants' claims for cost and deduction, I shall simply proceed to determine the amount of their sales.

4.

On August 2nd, Mr. Finkelstein claimed that the defendants used the two Givenchy emblems only on T-shirts and sold a total of only about 1,000 to 2,000 T-shirts with either of the two emblems. He said they did not use an outside embroiderer for these particular emblems, which he said were embroidered "in house." He said he had obtained only one embroidering stencil for each of the two emblems. He claimed

4.

Most of these statements were elaborated in Mr. Finkelstein's affidavit of September 2nd (Exhibit 16).

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that a maximum of only 1,500 T-shirts could be embroidered from one of these stencils before it wore out. To no one's surprise, he refused to say how he obtained the stencils.

According to him, the defendants kept very few records. The T-shirts with these two emblems were referred to only by the general category of "short sleeve basic", or sometimes, even more generally, by the term "tops". However, he said that these categories included a large number of garments which were not covered by this Court's judgment, because the defendants used numerous other emblems on T-shirts and other garments. He said the defendants never kept any records about any specific emblems.

I directed the defendants to supply all of their invoices for every sale that possibly included one of the two Givenchy emblems. In response, they submitted a total of eleven invoices (Exhibits 4-14). Plaintiff, to meet its burden of proof, relies on these invoices, plus a copy of a twelfth invoice which they obtained from Bolton's (Exhibit 15).

The defendants now seek to withdraw two of their invoices from the sales computation, namely Exhibits 11 and 14.
5.
Mr. Finkelstein has submitted an affidavit stating that Exhibit 11 was provided by mistake, and relates to another trademark lawsuit

5.

Exhibit 16, ¶10.

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against him involving an Anne Klein emblem. The affidavit states that "to the best of my recollection", the defendants sold nothing with the two Givenchy emblems to the customer named in this invoice I. Siegel of Cohoes, New York. Since plaintiff has introduced no evidence to the contrary, I do not feel it can capitalize on Exhibit 11.

Exhibit 14 was submitted belatedly on August 23rd as "the one missing Bolton's invoice." On August 25th Mr. Finkelstein went to the office of plaintiff's attorneys. I was not present, but the events are undisputed. Plaintiff's attorneys showed him a copy of a different invoice to Bolton's (Exhibit 15) which they had introduced as evidence before this Court on July 28, 1975. Mr. Finkelstein said there was only one sale to Bolton's, and that he had been unable to find the invoice. He announced that Exhibit 14 was not a genuine invoice, and that he had freshly "reconstructed" it "from memory." 6.

Mr. Finkelstein's exercise in creative writing was clearly outrageous. It would certainly be poetic justice to apply an estoppel and to increase the sales figure by the amount

6.

Mr. Keshishian acknowledged this to me on August 27th.

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that was written down by his nimble pen. However, I have decided not to do so. I am satisfied that Exhibits 14 and 15 reflect a single sale. They each refer to a sale of 1,000 tops, although the prices are slightly different. The phony invoice is undated, unlike the others. In computing the amount of sales, I have not used Exhibit 14. However, in assessing the other evidence, and in deciding when plaintiff has met its burden of proof, I have given weight to the fact that Mr. Finkelstein is capable of fabricating evidence.

I turn now to the remaining ten invoices. They show total sales of \$18,105.00 prior to the consent decree and \$2,968.40 after it. The invoices prior to the consent decree refer only to "tops" and "short sleeve basic." The later invoices refer, in addition, to other types of garments, namely, "long sleeve basic," "patch pocket," and "short sleeve Sheffli."

Mr. Finkelstein has stated in an affidavit (Exhibit 16, ¶8), that the defendants never used the two Givenchy marks on these latter three types of garments. The plaintiff has introduced no evidence to the contrary. Accordingly, I will exclude the sales of those garments. This reduces the sales after the consent decree to \$2,586.00. The pre-decree sales remain unchanged at \$18,105.00.

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The defendants claim, on the basis of vague recollection, that only about 25% of these sales involved the two Givenchy emblems, and that the remainder involved other emblems (Exhibit 16, ¶4 and ¶8). Plaintiff claims that 100% of these sales should be deemed to be sales of the two Givenchy emblems. It contends that it has met its burden of proof by offering the invoices, and the defendants should now have the burden of proving that any of these sales involved other emblems. Plaintiff relies on the well-established doctrine that a trademark infringer is liable as a trustee for profits accruing from his illegal actions, and plaintiff cites Baker v. Simmons Co., 325 F.2d 580, 582-83 (1st Cir. 1963), cert. denied, 382 U.S. 820 (1965). However, in that case there was no apparent dispute as to how many sales were made under the infringing name "Simmonds." The problem was whether to include all of the sales or only those that were in competition with the plaintiff.

In the case at bar, the issue is, how many sales were made with plaintiff's emblems? A case more on point is Deering, Milliken & Co. v. Gilbert, 269 F.2d 191, 193-94 (2d Cir. 1959). The defendant there denied all sales, and refused to produce any records. Judge Palmieri then determined the amount of sales of fabric by a very indirect method, utilizing the number of "hang

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tags" found at defendant's premises by police executing a search warrant. The Court of Appeals affirmed and cited the ancient English case of Amory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (1722). The Court held that the risk of uncertainty must be borne by the wilfull infringer, where he prevents proof by the most satisfactory evidence.

I have decided that the sales of the two Givenchy emblems amounted to 100% of the sales of "tops" and "short sleeve basic" shown on the ten invoices.

This decision is based on three reasons:

(1) The defendants failed to keep any records about the two Givenchy emblems, even though they knew that these emblems belonged to Givenchy.

(2) The defendants have prevented proof by the most satisfactory evidence.

(3) I do not believe the defendants' claim that their sales of the two Givenchy emblems amounted to little more than \$5,000.

I think that the record already before the Court establishes that Mr. Finkelstein knew that both emblems belonged to Givenchy. As to the first emblem, Mr. Finkelstein testified that he saw a Givenchy T-shirt in a newspaper advertisement dated March 23, 1975. (Tr. of hearing on July 28, 1975, pp.

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66-67). His then attorney offered it as Exhibit C. The plaintiff has submitted a photocopy of what is obviously the same advertisement (Exhibit 20). The T-shirt is clearly identified as Givenchy's, the emblem is clearly displayed, and the headline refers to "Status T's." Mr. Finkelstein may not

have realized that the emblem was a common law trademark in so many words, but he obviously realized that it was a symbol associated with Givenchy and that it was a symbol with "commercial magnetism." See Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

In these circumstances, Mr. Finkelstein became a trustee for the profits he was making from this emblem. He chose to keep vague records, with no reference to this emblem. He admits that these records contain a substantial amount of sales of this emblem. He took the risk that the burden would pass to him to attempt to weed out these sales from his alleged sales of other emblems.

The second emblem is an easier case for the same result, since Mr. Finkelstein acted in wilfull violation of the consent decree, which ordered him not to use any colorable imitation.

The type of evidence which the defendants have supplied is plainly not the most satisfactory. For one thing, they do not even have a full set of invoices. They have been unable to find their copy of the invoice for the Bolton's sale, one of

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SPECIAL MASTER'S REPORT

their very largest sales. Second, they ask us to rely completely on Mr. Finkelstein's memory and honesty in selecting the few invoices which they have supplied. Since the invoices never refer to emblems, he is simply claiming to remember that certain customers never bought the two Givenchy emblems, even though they bought "tops" during the time in question.

When plaintiff knows the name of "another" customer (I. Siegel), Mr. Finkelstein hedges. (Exhibit 16, ¶10: "To the best of my recollection, I. Siegel did not receive any goods with Plaintiff's mark.") When plaintiff is in the dark, Mr. Finkelstein claims his memory is positive. (Exhibit 16, ¶5: "I am in a positive position to state that the stores previously

listed would be the only ones who would be interested in my goods which would have borne the Plaintiff's mark.") By refusing to answer Questions 1, 4 and 13, the defendants prevented proof by more satisfactory evidence, and prevented the plaintiff from having any way to verify Mr. Finkelstein's memory and honesty.

Finally, I do not believe the defendants' claim that their gross sales of the two emblems were little more than \$5,000. Mr. Finkelstein is simply not a credible man. He wilfully violated the consent decree. He fabricated a document in this proceeding. He says the defendants sold the two emblems to only five customers; they happen to be the same five customers that the plaintiff had already discovered and brought to the

SPECIAL MASTER'S REPORT

Court's attention.⁷ Plaintiff has stated that it checked only six stores in the metropolitan area, and five of them were selling the infringing T-shirts.⁸ I assume that plaintiff has some idea what types of stores buy this sort of merchandise. But I find it incredible that the defendants sold to no more than these five.

Especially unbelievable are the defendants' claims concerning the sales of the second emblem, after the consent decree. On August 2nd, Mr. Finkelstein did not have any records with him, but he estimated that he sold the second emblem from about November 1975 until March 1976. Yet the invoices which he later supplied begin on January 15, 1976 and end on February 5th.⁹ He also said that he had obtained an embroidering stencil for the second emblem, that it was in good condition, and that such a stencil could be used to embroider up to 1,500 T-shirts. Yet the invoices show only 455 T-shirts, and he claims that only part of them bore the second emblem.

For the reasons stated above, I find that Fashion Associates, Inc. made profits of \$18,105.00 from sales of the first emblem prior to the consent decree, and I find that all three defendants jointly made profits of \$2,586.00 by virtue of their contemptuous acts and their sales of the second emblem from October 21, 1975 through June 9, 1976.

7. See Exhibits 21 and 22.

8. See Exhibit 22.

9. This would mean that the defendants stopped these sales six weeks before they were enjoined without notice by Judge Tenney on March 16th.

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VII. Other Relief

I do not have complete assurance that the award of \$20,691.00, plus \$2,885 in attorney's fees, amounts to all that plaintiff would be entitled to, if all the facts were known. If the Court finds that the award is inadequate, it possesses broad discretion to increase it under Title 15, United States Code, §1117. The amount of profits has been trebled even where the amount was computed by indirect methods. Deering, Milliken & Co. v. Gilbert, supra, 269 F.2d at 194.

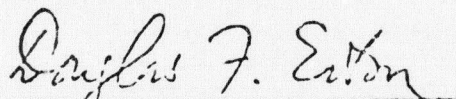
Alternatively, the Court could order further discovery under pain of contempt. However, plaintiff has indicated that it wants to obtain a final judgment as speedily as possible.

VIII. Application for Special Master's Fees

The Court's order of June 9th provided that the defendants were to pay all of my fees. I hereby apply for fees in the amount of \$5,875.00. I am submitting with this Report a separate affidavit to support this application.

Dated: New York, New York
September 9, 1976.

Respectfully submitted,



DOUGLAS F. EATON
745 Fifth Avenue
New York, New York 10022
759-1919

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SPECIAL MASTER'S REPORT

LIST OF SPECIAL MASTER'S EXHIBITS

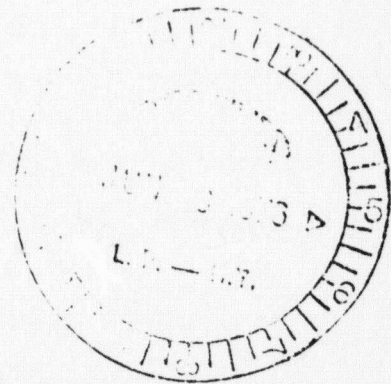
1. Special Master's discovery order of June 25, 1976
2. Plaintiff's motion for sanctions
3. Mr. Finkelstein's affidavit of August 5, 1976
4. Invoice dated 5/22/75
5. Invoice dated 6/2/75 to "Freddie"
6. Invoice dated 6/2/75 to Empire Sportswear
7. Invoice dated 6/4/75
8. Invoice dated 6/19/75
9. Invoice dated 6/22/75
10. Invoice dated 1/15/76
11. Invoice dated 1/19/76
12. Invoice dated 1/20/76
13. Invoice dated 2/5/76
14. Purported invoice to Bolton's, undated
15. Invoice to Bolton's, dated 6/27/75
16. Mr. Finkelstein's affidavit of September 2, 1976
17. Mr. Keshishian's letter dated July 28, 1976
18. Mr. Finkelstein's affidavit of August 6, 1976
19. Mr. Palik's affidavit of August 26, 1976
20. New York Times advertisement, another copy of which
was received as Defendant's Exhibit C at the
hearing of July 28, 1975

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21. Mr. Palik's letter of September 2, 1976, with
attached subpoena of Fred Gerson
22. Mr. Palik's affidavit of September 8, 1976

SPECIAL MASTER'S REPORT
Exhibit 1LAW OFFICE
DOUGLAS F. EATON
SUITE 1909
745 FIFTH AVENUE
NEW YORK, N. Y. 10022
PLAZA 9-1919

June 25, 1976

Paul B. Morofsky, Esq.
Robert Rattet, Esq.
Matthew M. Keshishian, Esq.Re: Chesa International vs. Fashion Associates

Dear Sirs:

Pursuant to our meeting yesterday, the defendants are directed to deliver the following documents to Mr. Morofsky's office by 10:00 A.M. on July 6:

A. An affidavit, sworn to by Jerome Finkelstein, setting forth the following questions and the answers to them. All of the questions are limited to the period between January 1, 1974 and June 8, 1976.

✓ 1. What are the names and addresses of every company which ever performed any embroidery work on any merchandise for Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein?

2. Of the companies named in answer to Question 1, which ones ever embroidered any of the trademarks shown in Exhibits A, B and D attached to Judge MacMahon's order dated June 8, 1976?

3. Did Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein ever perform any embroidery work "in house"?

✓ 4. What are the names and addresses of every customer (including buying offices) in the United States which ever received any merchandise from Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein?

5. Of the customers named in answer to Question 4, which ones ever received any merchandise bearing any of the trademarks shown in Exhibits A, B and D attached to Judge MacMahon's order dated June 8, 1976?

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SPECIAL MASTER'S REPORT
Exhibit 1

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6. Do any of the customers named in answer to Question 5 still owe money for any of such merchandise? If so, what is the amount of money owed by each such customer?

7. What are the names and addresses of every company which ever performed any advertising services for Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein?

8. What are the names of every person who was ever in charge of the shipping department at Fashion Associates, Inc. or at Hong Kong Quality Knitters, Ltd.?

9. What are the names of every person who was ever in charge of the bookkeeping department at Fashion Associates, Inc. or at Hong Kong Quality Knitters, Ltd.?

10. What are the names and addresses of every person who ever performed any accounting services for Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein?

11. What types of clothing articles were ever sold by Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein?

12. What style numbers and other types of style identification were ever used (on merchandise or in internal records) by Fashion Associates, Inc., Hong Kong Quality Knitters, Ltd., or Jerome Finkelstein in connection with any merchandise bearing any of the trademarks shown in Exhibits A, B and D attached to Judge MacMahon's order dated June 8, 1976?

✓ 13. What are the names (including all trading names) of every company which was ever involved in the garment business between January 1, 1974 and June 8, 1976, and of which Jerome Finkelstein, during any part of that time, was an officer, partner, or the owner of more than 10% of the stock?

B. Legible copies of the following documents:

1. All sales invoices, receipts, shipping documents, contracts and catalogues relating to any merchandise bearing any of the trademarks shown in Exhibits A, B and D attached to Judge MacMahon's order dated June 8, 1976.

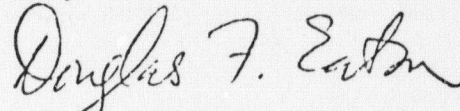
2. All documents which support any element of cost or deduction claimed by defendants.

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SPECIAL MASTER'S REPORT
Exhibit 1

page 3

The attorneys for the plaintiff are directed not to divulge, to their client or to anyone not in the employ of their law firm, any of the names or addresses of embroiderers or customers. The attorneys for the plaintiff have gone further. They have voluntarily agreed not to divulge any of the information which is supplied pursuant to this letter, unless they first notify Mr. Keshishian far enough in advance so that he would be able to apply for a protective order.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas F. Eaton". The signature is written in dark ink and is positioned above the typed name.

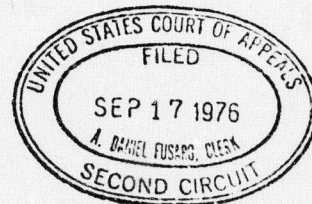
Douglas F. Eaton
Special Master

ORDER OF DISMISSAL TO APPEAL DOCKET NO. 76-7328

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for
the Second Circuit, held at the United States Court House, in the City
of New York, on the 17th day of September, one
thousand nine hundred and seventy-six

CHESA INTERNATIONAL, INC.,
Plaintiff-Appellee,
v.
FASHION ASSOCIATES, INC., HONG KONG
QUALITY KNITTERS, LTD., JEROME
FINKELSTEIN and ETHEL FINKELSTEIN,
Defendants,
FASHION ASSOCIATES, INC., HONG KONG
QUALITY KNITTERS, LTD., and JEROME
FINKELSTEIN,
Defendants-Appellants



76-7328

A scheduling order having been entered herein in accordance with
paragraph 4 of the Civil Appeals Management Plan of this court directing that
~~the record on appeal shall be filed on or before~~
the appellant's brief and joint appendix shall be filed on or before Sept. 7, 1976
and that in the event of default by the appellant in either of
which the appeal shall be dismissed forthwith

And said brief and appendix not having been so
filed

Upon consideration thereof, it is ordered that the appeal from the
order of the United States District Court for the
Southern District of New York be and it hereby is
dismissed.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk